84-727

NO.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

MICHAEL J. KOONCE,

Petitioner,

vs.

STATE OF INDIANA

Respondent.

ON WRIT OF CERTIORARI TO THE INDIANA SUPREME COURT

PETITION FOR A WRIT OF CERTIORARI

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THE QUESTION PRESENTED FOR REVIEW

Were investigators employed by the petitioner's insurance carrier acting as agents of the law enforcement authorities so as to bring their search of the petitioner's fire-damaged home within the warrant requirements of the Fourth Amendment?

THE PARTIES TO THE PROCEEDING

The parties to the proceeding are those shown in the caption of the case.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

REFERENCE TO THE OPINION BELOW

The decision of the Indiana Supreme Court, without opinion, appears as Appendix A hereto.

This case came to that Court under the Indiana "transfer" procedure, the petitioner's Petition for Rehearing having been first denied by the Indiana Court of Appeals. (Indiana Rules of Appellate Procedure, Rules AP 11(A) and (B).) The Indiana Court of Appeals' decision denying rehearing is attached hereto as Appendix B.

Prior thereto, the Indiana Court of Appeals affirmed, with written opinion, the trial court's judgment, which opinion appears as Appendix C. (Indiana Rules of Appellate Procedure, Rule AP 4(B).)

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The decision of the Indiana Supreme Court denying the petitioner's Petition to Transfer was entered on September 5, 1984.

The decision of the Indiana Court of Appeals denying the petitioner's Petition for Rehearing was entered on May 23, 1984.

The Indiana Court of Appeals affirmed the judgment of the trial court on March 28, 1984.

The Supreme Court of Indiana is the highest court in that State having jurisdiction to review decisions of lower state courts. (Indiana Rules of Appelate Procedure, Rule AP 11 (B).)

This petition for writ of certiorari will be filed within sixty (60) days of the judgment of the Indiana Supreme Court. Jurisdiction of this Court is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Fourth Amendment:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be

searched, and the persons or things to be seized."

STATEMENT OF THE CASE

(Page references herein are to the Record of the Proceedings. "R", and Supplemental Record of the Proceedings, "Supp. R." filed with the Indiana Court of Appeals.

The action was instituted by the the filing of a one (1) count indictment on March 2, 1982 alleging that the petitioner committed the offense of arson on October 7, 1981 by setting fire to his home located in Evansville, Indiana. (R. 6-7) The petitioner entered a plea of not guilty, and the matter was set for trial by jury. (R. 10)

Prior to trial, the petitioner filed a motion to suppress seeking to exclude all evidence seized by the State of Indiana through the investigations of A.R.C. Consultants and Investigators, Inc. (R. 29-31) The basis for the suppression of that evidence was stated as follows:

> "1. The investigations were conducted without the benefit of a valid search warrant.
>
> 2. A.R.C. Consultants, through Herbert T. Miller, and State Farm Fire and Casualty Co., through Richard Goldsmith, were acting as agents for the State of Indiana, specifically the Fire Department.
>
> 3. Any and all evidence obtained by the State of Indiana through its agents without a valid search warrant, where such warrant would be required had the State conducted its own investigation, is inadmissable as the illegal fruits of an unlawful and unreasonable search and seizure." (Petitioner's motion to suppress, R. 29-31)

A hearing was held on the petitioner's motion to suppress and the motion was ultimately denied. (R.29, 46-47, Supp. R.1)

Trial to a jury commenced on September 13, 1983. At trial, the petitioner interposed an objection to the testimony of Richard

Godsmith as to the results of his inspection of the petitioner's hone, the basis of that objection being those reasons set forth in his motion to suppress. The petitioner further requested that his objection be shown to be a continuing objection.

The facts adduced at the hearing on petitioner's motion to suppress and at trial which are relevant to the issue presented in this petition can be summarized as follows:

On October 7, 1981 at approximately 10:30 P.M. a fire was reported at the residence of the petitioner. (R. 85) The Evansville Fire Department arrived and extinguished the blaze. Nothing suspicious was observed by the captain of the pumper summoned. (R. 89)

Roger Griffin was the Fire Investigator for the Evansville Fire Department, part of his duties being to investigate fires of suspicious origin. (R. 277) He first became aware of the fire at the petitioner's residence on the morning of October 8, 1981 after the fire had been extinguished. (R. 277) The information he received through Fire Department channels did not indicate that the origin of the fire was suspect. (R. 278, Supp. R. 7)

On that same morning the petitioner met with Richard Goldsmith representing his insurance carrier, State Farm. (R. 92) Goldsmith surveyed the damage with the petitioner, and at that time formed the opinion that the origin of the fire was suspect, and the matter deserved further investigation. (Supp. R. 32)

Later in the day on October 8, 1981, Griffin, in his capacity of Fire Investigator, met with Goldsmith at the petitioner's home, and a search of the home was conducted by them. (R. 276, Supp. R. 9) Upon completion of the search, Goldsmith stated that he believed that the fire had been deliberately set. (Supp. R. 10)

Goldsmith contacted Herbert Miller of A.R.C. Consultants and Investigators, Inc. and employed him to do further investigation. (R. 188) On October 9, 1981, Miller, accompanied by Roger Griffin in his official capacity, went to the petitioner's home. Upon arrival, Miller conducted a search of the residence, though Griffin did not re-enter the home. (Supp. R. 10)

At no time did Griffin, Goldsmith or Miller apply for or receive a search warrant to enter the petitioner's residence. (Supp. R. 10, 19) Furthermore, Griffin testified that he relied upon Goldsmith and Miller to do the investigation of the cause and origin of the fire. (R. 281, Supp. R 13) Information required by state law to be transmitted to the State Fire Marshal

was reported by Griffin based on information provided him by Goldsmith and Miller. (R. 283) Subsequent to the completion of the investigation, Goldsmith requested that Griffin go to the Prosecutor in order to move the case toward the filing of charges. (R. 283)

At trial, Goldsmith and Miller testified that in their opinion the fire was deliberately set. Miller also indentified a number of exhibits resulting from his search of petitioner's residence. The State also called Barker Davie, a forensic chemist and fire investigator, who testified to his findings based upon exhibits gathered by Miller. (R. 254-255)

On September 14, 1982, the jury returned its verdict, finding the petitioner guilty as charged. On October 11, 1982, the petitioner was sentenced to a term of imprisonment of two (2) years. (R. 73)

Petitioner filed a Motion to Correct Errors (the Indiana pre-requisite to an appeal) with the trial court on December 10, 1982. (R. 70) In it, the petitioner cited as error the overruling of his motion to suppress and of his continuing objection at trial to testimony relating to the results of the search conducted of the petitioner's residence. Petitioner's Motion to Correct Errors was overruled on January 4, 1983.

Petitioner then timely prosecuted his appeal to the Indiana Court of Appeals. In his appellant's brief, he once again argued as error the trial court's rulings concerning the admissibility of evidence obtained by Goldsmith and Miller during the search of petitioner's home, and of Davie's testimony based upon that evidence.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

The Indiana state court has decided a federal question of substance not in accord with the applicable decisions of this Court.

The rule regarding searches of property damaged by fire was established in *Michigan v. Tyler,* 436 U.S. 499, 98 S.Ct. 1942, 56 L.Ed.2d 486 (1978) as follows:

> "[A]n entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire

> must be made pursuant to the warrant procedures governing administrative searches." *Id.* at 512, 98 S.Ct. 1942, 56 L.Ed.2d 486, 500.

Three separate searches of petitioner's residence occurred after the fire had been extinguished. The first occurred on October 8, 1981, the morning after the fire, when Rick Goldsmith of State Farm Insurance toured the home accompanied by the petitioner. The second took place in the early afternoon of October 8, 1981, when Goldsmith and Roger Griffin, Fire Inspector of the Evansville Fire Department, conducted a joint search. The final search occurred the next day, October 9. Griffin, this time accompanied by Herbert Miller, of A.R.C. Consultants and Investigators, Inc., went to the petitioner's home where Miller conducted a search and gathered evidence. While Griffin was present at the scene, he did not re-enter the home.

If all three individuals were governmental officials charged with the investigation of arson, then clearly *Michigan v. Tyler, id,* would apply and the results of their searches would have been inadmissible. Goldsmith and Miller, however, were private citizens, for whose actions the Fourth Amendment poses, generally, no restraint. *Burdeau v. McDowell,* 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921). The question squarely presented, therefore, is whether Goldsmith and Miller, at the time they conducted the searches, were engaged in a joint enterprise with the law enforcement officials, thus, rendering them agents of the state and the fruits of their searches inadmissible.

This question is necessarily one which is fact-sensitive. In *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, (1971) this Court held that petitioner's wife was not acting as an agent of the police in turning over the murder weapon. That conclusion was based upon the fact that the police did not go to petitioner's home for the purpose of recovering the weapon and that the petitioner's wife voluntarily produced the gun without being requested to do so.

In the case at bar, there can be no doubt that the purpose of the several searches was to uncover evidence of arson. At the first inspection of the residence, while accompanied by the petitioner, Rick Goldsmith formed the opinion that the origin of the fire was suspect. Subsequent searches were conducted to seize evidence to support that view. Also, unlike the facts in *Coolidge,* there was no voluntary and unsolicited donation of

incriminating evidence.

A case whose facts more closely parallel those in petitioner's case is *Lustig v. United States,* 338 U.S. 74, 69 S.Ct. 1372, 93 L.Ed. 1819 (1946). Decided prior to *Mapp v. Ohio,* 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), *Lustig* considered the question of whether the United States could use evidence seized by state authorities in a joint federal-state warrantless search. The Court held that the evidence seized must be excluded as the federal agent's participation in the joint endeavor had turned it into an illegal federal search.

The facts presented in *Lustig* were that Secret Service Agent Green received a call from the local police concerning possible counterfeiting being carried out in a hotel room. Greene went to the hotel room in question and peeked in the keyhole, but saw no evidence of counterfeiting. He then went to police headquarters where the local police secured arrest warrants for the two men.

The police officers drove to the hotel while Greene remained behind. Finding no one in the room, they entered and searched the premises. At their request, Greene then came to the hotel and examined the evidence which had been seized. When petitioner finally returned and was arrested, Greene also examined articles taken from his pocket. All evidence relating to counterfeiting was ultimately turned over to Secret Service Agent Greene.

While admittedly the issue in *Lustig v. United States* is different, the decision is indicative of what degree of participation is required by one whose actions are governed by the Fourth Admendment before the exclusionary rule comes into play. In the case at bar, Roger Griffin actually accompanied Rick Goldsmith on a search conducted to uncover evidence of arson. The next day he again traveled to the residence, this time with Herbert Miller. While Griffin did not re-enter the home, he waited while Miller gathered additional evidence relating to arson. At no time did anyone attempt to obtain a search warrant.

Griffin then utilized the information uncovered by Goldsmith and Miller in preparing the reports required by the State Fire Marshal. In addition, at the request of Goldsmith, he went to the local prosecutor in order to expedite the filing of criminal charges against the petitioner.

Like Agent Greene, Griffin had a hand in all stages of the evidence gathering process leading up to petitioner's conviction. He not only relied upon others to perform those tasks assigned

to him as Fire Investigator, but also accompanied them as they searched for incriminating evidence.

Other courts have excluded evidence seized by private individuals where there has been a high degree of governmental participation in the warrantless search. In *Pomerantz v. State,* 372 So.2d 104 (Fla. App. 3d, 1979), police officers informed airline personnel at the Miami airport that they could not instruct them to open the defendant's luggage, but waited around while the airline employees took the hint and did just that. Once opened, the police officer assited in searching the contents. This, the Court held, constituted an unlawful governmental search.

The Court in *United States v. Robinson,* 504 F.Supp. 425 (N.D. Ga. 1980) ordered evidence suppressed where an airline employee searched the defendant's baggage "at the unspoken, but real, encouragement of (DEA) Agent Chapman, rendering the search of defendant's friend's blue suitcase a governmental search." In *State v. Bechich,* 509 P.2d 1232 (Or.App., 1973), the Oregon Court, upon being presented with a "joint search" fact situation, held that "the extent of official involvement in the total enterprise is the crucial element". *ID* at 1234: *See:* 1 LAVAVE, *Search and Seizure* §1.6 (1978).

And in *State v. Furuyama,* 64 Hawaii 109, 637 P.2d 1095 (1981), members of a citizens group, accompanied by an undercover police officer, entered an adult bookstore. Once inside, the civilians selected certain books and handed them to the officer. He then presented, payed for, and arrested the proprietor. The Court held:

> "The individuals were not mere bystanders; they were active members of a police directed, if not inspired, joint effort to gather evidence. There is no basis for viewing their deeds as essentially private action. There was a concerted and deliberate effort here to facilitate a quest for uncriminating proof that also culminated in an illegal seizure." *Id.* at 637 P.2d 1095, 1103

What we have is not the case of a private individual who, for whatever reason seizes incriminating evidence and turns it over to the authorities on the traditional silver platter. Immediately following the initial tour of the damaged home by

Rick Goldsmith which aroused his suspicions, the Fire Investigator (translated: Arson Investigator) of the Evansville Fire Department was involved in the investigation to the point of unlawfully entering the premises on one occasion.

Nor do we have the case where a private individual and a government official are pursuing a similar goal through independent means. Roger Griffin, Fire Inspector, totally relied on evidence gathered by Goldsmith and Herbert in fulfilling his job-related and legal duties.

If the petitioner's conviction is upheld, then no court will ever face those issues raised in *Michigan v. Tyler, supra,* where the damaged premises are insured. In such cases, the goals of the insurance and fire inspectors are identical — to show, if possible, that the insured is guilty of arson. Why should a search warrant be sought when the investigators for the insurance company can search the premises in the manner and method they choose, and the enforcement authorities then utilize that evidence not only to fulfill their duties but to obtain a conviction as well. If the Fourth Amendment is to remain a viable deterrent to illegal searches and seizures, then law-enforcement authorities cannot be permitted to escape compliance with its requirements by the mere expedient of delegating yet assisting in the performance of their duties by others.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Indiana Supreme Court.

Respectfully submitted,

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APPENDIX A

DECISION OF INDIANA SUPREME COURT ON PETITION TO TRANSFER

STATE OF INDIANA **INDIANAPOLIS, 46204**

CLERK OF THE SUPREME COURT AND COURT OF APPEALS **TELEPHONE 232-1930**

MARJORIE H. O'LAUGHLIN, CLERK
217 STATE HOUSE

NO. 4-183A20
Michael J. Koonce v. State of Indiana

You are hereby notified that the Supreme Court has on this day Appellant's petition for Transfer Denied without opinion.
Givan, C.J. all Justices Concur

Please acknowledge receipt of this notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court, this 5 day of Sept, 1984.

Marjorie H. O'Laughlin
Clerk Supreme Court and
Court of Appeals

APPENDIX B

DECISION OF INDIANA COURT OF APPEALS ON PETITION FOR REHEARING

STATE OF INDIANA
CLERK OF THE SUPREME COURT AND COURT OF APPEALS

INDIANAPOLIS, 46204
TELEPHONE 232-1930

MARJORIE H. O'LAUGHLIN, CLERK
217 STATE HOUSE

NO. 4-183A20
Michael J. Koonce v. State of Indiana

You are hereby notified that the Court of Appeal has on this day
Appellants petition for Rehearing Denied.
Buchanan, C.J.

Please acknowledge receipt of his notice in order that our records may show that you have been notified of this action.

WITNESS my name and the seal of said Court,
this 23 day of May, 1984

Marjorie H. O'Laughlin
Clerk Supreme Court and
Court of Appeals

APPENDIX C

OPINION AND JUDGMENT OF COURT OF APPEALS OF INDIANA

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IN THE COURT OF APPEALS OF INDIANA
FOURTH DISTRICT

FILED
MAR 28 1984
Marjorie H. O'Laughlin
CLERK OF THE
INDIANA SUPREME
AND COURT OF APPEALS

MICHAEL J. KOONCE
Appellant (Defendant Below)

-v-

STATE OF INDIANA
Appellee (Plaintiff Below)

NO. 4-183 A 20

APPEAL FROM THE VANDERBURGH CIRCUIT COURT
The Honorable William H. Miller, Judge
Cause No. 3433

MILLER, J.

Michael J. Koonce was charged with and convicted of arson (a class C felony, IND. CODE 35-43-1-1-(c)) in connection with an October 7, 1981 fire in his Evansville home. He now appeals the jury verdict, claiming several evidentiary errors justify reversal. We find no grounds for reversal and affirm.

ISSUES

Koonce posits the following issues:

1. Did the trial court err in admitting the testimony of Roger Griffin, investigator for the Evansville Fire Department?

2. Did the trial court err in overruling Koonce's motion to suppress testimony based upon information and evidence gathered during warrantless searches of Koonce's home by representatives of his insurance company?

3. Did the trial court err in allowing the prosecutor to refer to his witness Herbert Miller, an arson investigator, as an "expert" in determining the cause and origin of fires?

FACTS

The facts most favorable to the judgment are as follows:

Michael Koonce, the defendant here, left his home for work about 9:45 P.M. October 7, 1981. Shortly after 10:00 P.M. that evening, firemen were called to extinguish a blaze at the residence. Although the fire department arrived on the scene within minutes, the home and its contents incurred substantial damage.

The following day at about 10:00 A.M., Rick Goldsmith, claims representative for Koonce's insurance company, State Farm Fire and Casualty, met Koonce at his home and the two men surveyed the premises. Goldsmith then interviewed Koonce at his office and informed Koonce that the investigation of the fire would continue and that the insurance company waived none of its rights to contest liability. Then, about 2:00 P.M. that day, Goldsmith met Roger Griffin, investigator for the Evansville Fire Department, at the Koonce home, where he conducted a second, more thorough investigation. After observing a low burn pattern (a possible indicator of arson) and an apparent absence of clothing and personal items, Goldsmith told Griffin he planned to hire A.R.C. Consultants & Investigators, Inc. (A.R.C.), an Indianapolis consulting firm specializing in the determination of the cause and origin of fires to look into the Koonce fire. The following day, October 9, Herbert Miller senior investigator for A.R.C., examined the Koonce home and took samples of debris. Miller testified at trial and said that his inspection of the home revealed the undersides of the furniture

in the home had burned, indicating a low burning fire. He also observed evidence in the burn patterns in Koonce's home that more than one fire was burning simultaneously and saw sharp demarcation lines between burned and non-burned areas, which he testified was not typical with normal burning and signaled the use of an accelerant. His investigation disclosed all doors to the home had been locked when the fire department arrived and while some windows were gone, their condition revealed they had been blown out during the blaze. According to Miller's tesitmony (sic) and that of forensic chemist Barker Davie, gasoline residue was present in two of the three debris samples taken from Koonce's home.

Goldsmith also testified at trial, stating he too observed evidence in the home of a low-burning fire which appeared to have started at two points. He also found Koonce's address book open to the page containing emergency phone numbers. His investigation further revealed Koonce had been trying unsuccessfully for six months to sell the home, that Koonce had plans to remarry and move to Atlanta where he had the possiblity (sic) of a job, and that Koonce's monthly debts exceeded his monthly income by about $130.00.

DECISION

Issue One — Admission of Griffin Testimony

Koonce claims error in the trial court's admission of the testimony of Roger Griffin, investigator for the Evansville Fire Department, urging the trial court erroneously overruled Koonce's motion to suppress Griffin's testimony as the product of an illegal search. We find Koonce's argument must fail for a number of reasons.

First, a careful reading of the motion to suppress reveals that Koonce sought only the suppression of evidence gathered through the investigations of A.R.C. Consultants and Investigators, Inc. and testimony relating thereto. The gravamen of the motion was an allegation that insurance investigators Herbert Miller and Richard Goldsmith had conducted improper searches of his residence. The motion contains no reference to any illegal conduct by Griffin, or to his investigation or testimony. Second, we observe that Griffin's testimony was admitted at trial without objection. Any claim of error in its admission was thus waived. *Owens v. State,* (1981) Ind., 427

N.E.2d 880; *Hoy v. State,* (1983) Ind. App., 448 N.E.2d 31.

Finally, even if we were to put aside any question of waiver and address Koonce's claim on the merits, we could find no reversible error in the admission of Griffin's testimony. The crux of Koonce's argument on appeal is that Griffin inspected Koonce's fire-damaged premises on October 8, 1983 (sic), the morning after the fire, without a search warrant.[1] Koonce asserts that inasmuch as the fire had already been extinguished at that time, any exigent circumstances requiring the presence of the fire department at Koonce's home had passed, thereby calling into play the constitutional requirement for a warrant prior to an administrative search. Because this warrant was not obtained, argues Koonce:

> "All testimony, therefore, of Mr. Griffin pertaining to his conclusions, findings, observations, etc. derived from these unconstitutional and unreasonable searches and any evidence seized at these times was improperly admitted into evidence during the trial of the defendant."

(Appellant's Brief, p. 18)

While Koonce's claims arguably present a constitutional argument concerning the admission of improperly obtained evidence, we must conclude no constitutional error occurred in the instant case after inspecting the record containing Griffin's testimony. The record clearly discloses that Griffin gave no direct evidence whatsoever concerning his inspection of the Koonce premises. His trial testimony was solely concerned with the manner in which the Evansville Fire Department approached the investigation of the Koonce fire, more particularly, Griffin's decision not to pursue an independent investigation of the cause and origin of the fire after State Farm expressed its intention to bring in a private consulting firm to perform an investigation. No substantive evidence as to what Griffin observed in the Koonce home was admitted, nor was there any testimony regarding any findings or conclusions he might have made as a result of his

[1]While Koonce also apparently alleges an October 9, 1982 search by Griffin, we note that Griffin's undisputed testimony at the suppression hearing revealed that while he met Herbert Miller at the scene that day, he neither entered the home nor participated in any search.

search of the premises. It is impossible for us to find any merit in Koonce's present claim that testimony as to Griffin's "conclusions, findings, observations, etc." should have been excluded as the product of an illegal search when the record undeniably shows no such testimony was ever introduced. Error alleged but not disclosed by the record is not a proper subject to review. See *Mitchell v. State,* (1983) Ind., 454 N.E.2d 395; *Grimes v. State,* (1983) Ind., 450 N.E.2d 512. Accordingly, we find no reversible error.

Issue Two — Suppression of Goldsmith, Miller & Davie Testimony

Koonce's next allegation of error is premised on the trial court's allegedly erroneous overruling of his motion to suppress certain evidence which he urges was the "fruit" of illegal and unconstitutional searches and seizures carried out by Richard Goldsmith and Herbert Miller, both of whom were employed by his insurer, State Farm Fire & Casualty. Although Koonce acknowledges case law instructing the constitutional proscriptions against unreasonable searches and seizures of the Fourth and Fourteenth Amendments apply only to government actions and not those of private citizens, see *Torres v. State,* (1982) Ind., 442 N.E.2d 1021; *Zupp v. State,* (1972) Ind., 283 N.E.2d 540, he asserts Goldsmith and Miller acted as agents of the Evansville Fire Department in investigating the fire, and their conduct thus fell within the purview of government action for the purposes of the law relating to warrantless search.

Koonce made a pre-trial motion to suppress all testimony relating to the Goldsmith and Miller inspections. The trial court held an evidentiary hearing, after which it denied the motion, concluding the insurance investigators were acting as agents of State Farm, not the Evansville Fire Department. Koonce then renewed his objection to Goldsmith's testimony at trial.[2] On appeal, Koonce reiterates his argument that Goldsmith and Miller acted not as private individuals but as state agents, and that their

[2]Although Koonce made a continuing objection to Goldsmith's testimony, we could find nothing in the record indicating an objection at trial on (see handwritten note below) constitutional grounds to either Miller's or Davie's testimony. It would thus appear that such objection as regards their testimony was waived by the failure to make a trial objection. *Rutledge v. State,* (1983) Ind. App., 452 N.E.2d 1039.

testimony and the related testimony of Davie, the forensic chemist, should be excluded as the products of warrantless searches of his home.

At the outset, we note that the burden of showing the evidence offered by Goldsmith, Miller and Davie was the product of illegal State activity lay with Koonce. *Maciejak v. State*, (1980) Ind., 404 N.E.2d 7. Further, a trial court's ruling on admissibility of evidence will be overturned on appeal only when it is shown that the ruling is clearly erroneous. *Best v. State*, (1982) Ind. App., 439 N.E.2d 1361.

At the suppression hearing, Griffin testified the Evansville Fire Department had no prior agreement with the State Farm investigators and stated the Department neither requested that A.R.C. carry out an investigation nor paid A.R.C. anything. He testified that while he d d rely in part on the findings of the insurance investigators, this was done for economic reasons and any reliance he did place on the insurance findings was partial, as he made his own decision as to arson based in part on his own on-the-scene investigation.

He also indicated that an Indiana statute requires insurance companies to furnish fire authorities with information they might have concerning a suspicious fire.[3]

Goldsmith, the State Farm claims representative, testified he had been given no reason to believe the Evansville Fire Department would rely on his investigation, although he might have made such an assumption as he became aware that no one had conducted another independent cause and origin investigation. He also stated that State Farm's investigation would have been conducted in the absence of any contact with the fire department, and that State Farm received neither instruction nor payment from the fire or police department in connection

[3]IND. CODE 22-11-5-10 instructs:

"Every fire insurance company transacting business in this state is hereby required to file with the state fire marshal, a report of all fires of a suspicious origin. The report shall be made immediately and shall contain such facts and circumstances as shall come to their knowledge tending to establish the cause or origin of the fire. Such report shall be in addition to and not in lieu of any report or reports that such companies may be required to make by any law of the state to the auditor of state or other state officer."

with the case.

We believe the facts presented herein are inapposite to those of *Stinchfield v. State,* (1977) Ind. App., 376 N.E.2d 1150, relied on by Koonce, which involved evidence seized by a paid informant who had been taken by police to the defendant's residence for the express purpose of securing a controlled substance. Instead, we find the instant circumstances more closely parallel those of *Maciejak v. State, supra,* where our supreme court found a lack of persuasive evidence that an insurance investigator acted as a *de facto* agent for the state in his search of the defendant's premises. Here, the evidence shows Griffin accompanied Goldsmith on one of his inspections of the Koonce premises, learned that State Farm planned to hire A.R.C. to determine the cause and origin of the fire and then, at some later point decided not to spend department funds to perform a second cause and origin determination. The trial court correctly found this was insufficient to prove State Farm's investigation was that of the State in light of evidence there was no agreement between State Farm and the department, no request or instruction to State Farm as to its conducting the investigation, and no payment of any kind. The evidence adduced at the hearing was sufficient to support the trial court's finding that the A.R.C. acted as an agent of State Farm when it investigated the Koonce fire. The record thus fails to support Koonce's allegation that the overruling of the motion to suppress was erroneous.

Issue Three — Recognition of Miller as Expert

Koonce next urges it was error for the trial court to allow the State to refer to its witness, Herbert Miller, as an expert. He contends that by improperly referring to Miller as an expert, the State invaded the province of the jury and indicated to them that Miller's testimony was more credible and entitled to greater weight than that of other witnesses.

The disputed reference arose after the State conducted an extensive examination into Miller's educational and professional background, including his numerous appearances as an expert witness (none of which was objected to by Koonce). The following exchange then occurred:

"MR. LANGOLIS [DEPUTY PROSECUTOR]: Your Honor, at this time the State would move to have Mr. Miller recognized as an expert in determin-

ing cause and origin of fires.

> MR. NOFFSINGER [KOONCE'S ATTORNEY]: I would OBJECT at this time. I think the proper time would be he offers testimony as to his conclusions. I don't think that just because he has been to school and all the Court can recognize him as anything."

(R. 186-87)

In his appellate brief, Koonce's counsel quotes only the first part of the dialogue (the State's request), and then declares:

> "Defendant objected and the Court overruled the objection. The basis for the defendant's objection was that, by referring to Mr. Miller as 'an expert,' the State placed undue emphasis on Mr. Miller's testimony to the prejudice of the defendant."

(Appellant's Brief, p. 28)

Even a cursory reading of the objection actually made at trial reveals the grounds offered on appeal are not at all the same grounds offered for objection at trial. The law is clear Koonce cannot assert a new and different theory on appeal than that claimed in the trial court. *Martin v. State,* (1963) Ind., 194 N.E.2d 721. When he failed to object on the grounds of prejudice, he waived such objection. See *Coonan v. State,* (1978) Ind., 382 N.E.2d 157 cert. den. 440 U.S. 984; *Perry v. State,* (1979) Ind. App., 393 N.E.2d 280.

Affirmed.
CONOVER, P.J. and YOUNG, J. CONCUR.